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No. 92-1029

In The

Supreme Court of the United States

October Term, 1992

SAM SKURNICK,

Petitioner,

vs.

AL AINSWORTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is judicial intervention appropriate to vacate an arbitration award when it is determined that the award was based upon arbitrary and capricious acts of the arbitrators?

2. To the extent that the questions presented by Skurnick merely presents an evidentiary question, they are inappropriate for review on writ of certiorari under the criteria outlined in Rule 10 of the Supreme Court Rules.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an appeal which originated from the District Court's June 19, 1989 Order which granted Respondent's Renewed Petition to Vacate Arbitration Award. Previously, the District Court had granted Respondent's Petition to Partially Vacate or Modify Arbitration Award by ordering a remand to the arbitral panel. Petitioner appealed to the Eleventh Circuit Court of Appeals

the portions of the Order that partially vacated (the arbitral award on remand) and that entered judgment on behalf of Respondent for statutory damages computed pursuant to §§ 517.12 and 517.211, Florida Statutes.

Respondent, Al Ainsworth ("Ainsworth"), a Florida resident, at all times relevant, commenced a business relationship with Petitioner, Sam Skurnick ("Skurnick"), by mail in January-March 1976. Throughout their relationship, Skurnick acted as Ainsworth's "stockbroker" from Skurnick's offices in New York City and Stamford, Connecticut. Skurnick admitted that Ainsworth gave him "discretionary control over (Ainsworth's) brokerage account" with Skurnick until January, 1985 when Ainsworth "terminated Skurnick's discretionary authority to manage his account." Skurnick's "clearing firm" for his brokerage activities during his brokerage relationship with Ainsworth was Prudential-Bache Securities, Inc. ("Pru-Bache"), although Skurnick also cleared through Bruns, Nordeman, Rea & Co. While it is true that Ainsworth was, at all times, deaf, the record summary of Skurnick's activities in Florida are:

> 1. The article which Ainsworth read relating to Skurnick's success with small accounts appeared in *Money's Worth*, a New York publication.
>
> 2. Ainsworth wrote to Skurnick in his New York office after reading the magazine article.
>
> 3. In response to Ainsworth's inquiry, Skurnick wrote to Ainsworth in Florida, including an application form and a letter which Ainsworth signed, giving Skurnick authority to open a discretionary margin account and enclosing a check made to Bruns,

Nordeman, Rea & Co.

4. Ainsworth completed the application form in Florida and returned it to Skurnick's New York Office.

5. Monthly statements were sent to Ainsworth in Florida by the firms through which Skurnick dealt, Bruns, Nordeman and Bache. Skurnick's name was prominently displayed on the statements.

6. Ainsworth is deaf and never spoke personally with Skurnick over the telephone. There were occasions when Skurnick spoke with Ainsworth's nephew. It is unclear from the record, however, whether Skurnick placed any of the telephone calls.

7. Skurnick speaks of writing letters to his clients.

8. Skurnick testified that he wrote to Ainsworth in Florida, suggesting that he get off margin.

9. Skurnick sent a rebate form to Skurnick in Florida which Ainsworth returned through the mail.

10. Skurnick wrote letters to his clients telling them to "hold on".

11. Skurnick wrote to Ainsworth in Florida concerning risk-spreading through diversification.

12. Skurnick placed ads in the Wall Street Journal.

13. Over the years of doing business, various correspondence took place between Ainsworth and Skurnick.

14. Ainsworth testified that he made inquiries of Skurnick a few times and received long-hand replies through the mail.

15. Skurnick knew that Ainsworth was a resident of Florida.

16. Skurnick's offices were in New York originally but moved later to Connecticut.

17. In 1976, Skurnick was registered as a broker/dealer in three States, namely, New Jersey, New York and Connecticut. By 1985, Skurnick was registered only in Connecticut.

18. Skurnick chose the clearing broker for Ainsworth.

19. Skurnick's clearing broker at the time that the transactions with Ainsworth commenced in 1976 was Bruns, Nordeman, Rea & Co.

20. Early in the nine-year relationship of Ainsworth and Skurnick, the latter changed clearing brokers and switched to Prudential Bache Securities Inc., as the clearing broker.

21. Skurnick's clearing brokers mailed confirmations of the securities transactions in Ainsworth's account to Ainsworth in Florida during the nine-years in which the securities account existed.

22. Skurnick was identified on the confirmations of securities transactions.

23. There were numerous transactions in Ainsworth's account over the nine-year period.

24. Ratifications occurring because of the receipt of confirmation, statements, etc., occurred in Florida.

25. Skurnick testified he was "engaged in the business as a broker."

26. Skurnick received commissions on all transactions effectuated in Ainsworth's account.

27. When Ainsworth moved within the State of Florida during 1976-85, he notified Skurnick who, then, communicated by mail to the new address.

28. Ainsworth signed two agreements sent to him by Skurnick, a standard customer's agreement and a joint account agreement.

29. Skurnick became registered with the National Association of Securities Dealers, Inc., as a broker/dealer in 1972.

30. Skurnick was registerd with the Securities and Exchange Commission ("S.E.C."), in 1972.

31. Skurnick testified: "I served as an introducing broker".

32. Despite his clearing broker's performing of its clearing functions, Skurnick basically was responsible for the handling of the account.

33. Skurnick had a special form for people like Ainsworth who wrote to Skurnick because of the *Money's Worth* article; and, this form was among the papers mailed to Ainsworth, completed by him, and mailed back to Skurnick.

34. Skurnick or one of his assistants wrote to Ainsworth for instructions.[1]

Skurnick was alleged to be an "introducing dealer" or "introducing broker" within the meaning of Florida's Administrative Code.

On August 14, 1986, Ainsworth filed a five-Count Verified Statement of Claim in Arbitration with the National Association of Securities Dealers, Inc. ("NASD") seeking recovery from Skurnick on two statutory causes of action for violations of Florida's Securities and Investor Protection Act ("SIPA"), *viz.*,

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1. Items 1 through 14 of the Summary of Skurnick's activities in Florida are contained in *Ainsworth v. Skurnick*, 909 F.2d 456 (11th Cir. 1990).

violations of Sections 517.12 and 517.301, Florida Statutes; and, three common law causes of action, *viz.*, breach of fiduciary duties, fraud and deceit, and negligence.

Section 517.12, Fla. Stat., requires registration by securities dealers who, "sell securities in this state from offices outside this state, by mail or otherwise." This express registration requirement for sales of securities in Florida to Florida residents from offices outside of Florida has been a part of SIPA since 1973, Laws of Florida 1973, c. 73-68, § 3 amending § 517.12, Fla. Stat. (1971). A sale of securities in violation of § 517.12, Fla. Stat., is an "unlawful" sale of securities that, "may be rescinded at the election of the purchaser . . . if the purchaser still owns the security, or for damages, if the purchaser has sold the security." A SIPA "dealer" includes "Any person . . . who engages, either for all or part of his time, directly or indirectly, as broker or principal. . . ." § 517.021(9)(a)1, Fla. Stat. a SIPA "broker" means a SIPA "dealer." § 517.021(7), Fla. Stat. In an action for damages pursuant to § 517.211, a purchaser "shall recover an amount equal to the difference between: (a) the consideration paid . . . plus interest; and (b) the value . . . at the time it was disposed . . . plus the amount of any income received." § 517.211(4), Fla. Stat.

Section 517.301, Fla. Stat., prohibits fraudulent securities transactions. For a violation of § 517.301, the purchaser is entitled, "to rescind . . . and recover damages as provided in § 517.211(3)(a), (4), and (6)." § 517.312(2), Fla. Stat.

Following an arbitral hearing on April 20, 1987, the panel of three arbitrators published their Award of June 2, 1987, that provided, among other things: "(T)he arbitrators . . . have decided . . . that they find for the Claimant but that he sustained no damages. . . . And, that the $300.00 filing fee . . . shall be refunded to the Claimant and assessed against the Respondent."

On June 23, 1987, Ainsworth filed a Petition to Partially Vacate or Modify Arbitration Award in the District Court, claiming the arbitrators had been evidently partial because SIPA contained formulae for the mandatory computing of damages for SIPA violations, the arbitrators had no discretion in this regard pursuant to § 517.12, Florida Statutes; and, Ainsworth had produced expert oral and documentary evidence of $54,108.78 of damages as of April 20, 1987 that Skurnick had countered solely by his own opinion testimony that Ainsworth had not been damaged. Subsequently, Ainsworth sought to amend his Petition to Partially Vacate to add the arbitrators' "manifest disregard of the law" as an additional ground for partially vacating the award which amendment was permitted by the District Court Order.[2]

Skurnick opposed the Petition to Partially Vacate and asserted three affirmative defenses: (1) a court cannot vacate an arbitral award for errors of law or fact; (2) an award is conclusive on all issues submitted and no judicial review thereof was authorized; and (3) arbitrators need not state reasons for an award.

On January 8, 1988, a non-jury trial was had on Ainsworth's Petition to Partially Vacate. Skurnick has misstated what transpired concerning the exhibits introduced by Ainsworth during this proceeding.

Prior to the non-jury trial taking place, the parties filed a joint pre-trial stipulation wherein Ainsworth listed as possible exhibits he would introduce "all exhibits introduced in the Arbitration Hearing. . . ." What Skurnick failed to understand was that Ainsworth had no obligation to introduce all exhibits. He only

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2. Contrary to Skurnick's statement on pages 6 and 7 of his Petition, it was Ainsworth who petitioned the court through his counsel. Forkey himself did not participate in the January 8, 1988 non-jury trial held before the District Court. This was handled by other counsel in the firm.

needed to introduce those he thought were material to his case. This he did. Any failure by Skurnick to introduce what he deemed to be appropriate exhibits was his own fault. The District Court did not conspire with Ainsworth to prevent Skurnick from presenting anything he deemed relevant to his case.

Following the non-jury trial, the District Court issued an Order of Remand on January 11, 1988 and ruled:

> Petitioner asserts two grounds for vacation of the arbitration award. . . . The basis of these assertions is that Florida Statutes, Chapter 517 contains a built-in provision for damages. However, the arbitration panel did not award damages. . .
>
> The arbitration award . . . does not specifically state that Respondent violated Fla. Stat. § 517.12, a statutory provision which triggers the application of the mandatory damages provision, Fla. Stat. § 517.211. The award is vague and cursory. It fails to adequately explain how the conclusion was reached. This Court is disturbed by the arbitration panel's conduct. . . In essence, the vagueness invites speculation and emasculates effective judicial review.
>
> * * *
>
> (S)ince the arbitration award below (# 86-1021) is capable of two very different interpretations, the proper course under these circumstances is to allow the arbitrators to resolve the ambiguity. If a statutory violation is

> found, damages should be awarded. . . . Without engaging in speculation, it is impossible for this Court to properly assess whether the arbitrators imposed statutory liability on Sam Skurnick. Until such a clarification is made, Petitioner cannot begin to prove nor can this Court determine whether the arbitration panel was evidently partial or acting in manifest disregard of the law in not awarding Al Ainsworth damages.

Upon remand, the arbitral panel reconvened in private session on March 4, 1988 and issued a new Award that recited in part:

> And, having now considered all evidence respecting each and every claim submitted for arbitral determination in connection with the Respondent's position as the Claimant's *broker/dealer*, we find that the Respondent was negligent in the handling of the Claimant's account, however, the Claimant sustained no damages.
>
> * * *
>
> And, further, it is our conclusion that the Claimant has not established his right to recover on any of the other claims filed in this proceeding. (Emphasis added.)

The new award deleted the refund of a $300.00 filing fee to Ainsworth that had been provided in the original award.

Upon the issuance of the arbitral award after remand from the District Court, Ainsworth filed a Renewed Petition to Vacate

Arbitration Award, supported by a separately filed memorandum of law, claiming evident partiality by the arbitrators because of a failure to take additional evidence; and a manifest disregard of the law, *viz.*, § 517.12, Florida Statutes, because (1) Skurnick had admitted that he had not been registered in Florida; and (2) the arbitrators had failed to award statutory damages because of a § 517.12, Florida Statutes violation; and (3) there was no support in the record for the arbitrators' finding of non-liability under § 517.12.

As part of Ainsworth's Renewed Petition to Vacate, the arbitral hearing transcript was included which contained Skurnick's testimony that he had never been registered in Florida and that he knew that if he did business in Florida he needed to be registered. Included also therein was Ainsworth's Memorandum of Law submitted in the NASD's arbitral proceeding concerning Skurnick's liability under § 517.12.

In Skurnick's Reply to the Renewed Petition to Vacate and supporting memorandum, Skurnick contended that the bases for the arbitrators' findings existed in the Award's language that the arbitrators had, "considered all evidence respecting each and every claim,"; that he was not a "dealer" within the meaning of SIPA even though he had testified to being a broker for stocks listed on the New York Stock Exchange; and, that his clearing brokers who sent monthly statements and transaction confirmations from outside of Florida to Ainsworth in Florida were registered as dealers in Florida. In his supporting Memorandum of Law in Opposition to the Renewed Petition to Vacate, Skurnick incorporated his Answer filed in the arbitral proceeding as an exhibit, and asserted four reasons for denying the Renewed Petition to Vacate: (1) errors of fact or law are not reversible; (2) there was no evidence of a violation of § 517.12; (3) the new award was not subject to judicial review; and (4) the Renewed Petition to Vacate negated the arbitration process.

In Ainsworth's response to Skurnick's filings in opposition to the Renewed Petition to Vacate, Ainsworth argued that Skurnick was a dealer within the meaning of § 517.021(9)(a), Florida Statutes; and, that Skurnick's usage of clearing brokers who were registered did not exempt them from registration as an "introducing broker" because Rule 3E-200.01(18) of Florida's Administrative Code specifically required registration of an "introducing broker" even though he did not perform clearing functions.

Following Skurnick's filing of objections to oral argument on Ainsworth's Renewed Petition to Vacate, the District Court issued its Order Vacating Arbitration Award and Entering Judgment for Ainsworth for statutory damages pursuant to §§ 517.12 and 517.211 in the amount of $54,108.78 with interest from April 20, 1987. The District Court expressly did not vacate either because of the panel's finding of negligence without damages or because the panel did not find violations of Ainsworth's claims of breach of fiduciary duties, fraud and deceit, or violation of § 517.301. Rather, the District Court reviewed the panel's finding that Skurnick was not proven to have violated § 517.12 for either evident partiality or manifest disregard of the law by the arbitrators and vacated because this finding was in contradiction to, "the only reasonable conclusion to be drawn from the facts," and, therefore, in manifest disregard of the law. The District Court's reasoning for its holding was that Skurnick had admitted non-registration; that the evidence established that Skurnick was a dealer within the meaning of § 517.021(9) and no other reasonable interpretation of the evidence thereon was possible; that Skurnick had made "sales" of securities to Ainsworth within the meaning of § 517.021(20) and § 517.12; and, that Skurnick's sales by mail into Florida required his registration in Florida pursuant to § 517.12. Judgment was entered by the District Court for the amount of statutory damages proved by Ainsworth without contradiction by Skurnick in the arbitration.

In a Motion for Reconsideration of Order Vacating Arbitration Award and Entering Judgment for Ainsworth, Skurnick contended (1) even if § 517.12 had been violated, no damages were required to be awarded; (2) only if the arbitrators had found a statutory violation could the manifest disregard of the law standard be applied; (3) the District Court misapplied the manifest disregard of the law standard and the arbitrators had, "(O)bviously considered the law pursuant to the Court's Order of Remand"; (4) there was no evidence that Skurnick was a "dealer" within the meaning of SIPA; (5) there was no evidence of Skurnick's selling of securities to Ainsworth but only evidence of selling securities for Ainsworth: "I testified that I sold stocks for AINSWORTH. In selling stocks for Ainsworth I admitted acting for him in the capacity of a broker"; and (6) there was no evidence of sales by Skurnick in Florida within the meaning of § 517.12. In his memorandum of law in support of his Motion for Reconsideration, Skurnick contended that a vacation for manifest disregard of the law could not be made because this standard was not expressed in the Federal Arbitration Act, 9 U.S.C. § 10 but quoted and cited numerous cases that recognized the manifest disregard of the law standard.

Skurnick's Motion for Reconsideration was denied.

In his initial brief to the Eleventh Circuit Court of Appeals, Skurnick stated that there were seven issues on appeal. Skurnick's initial brief raised issues on appeal that were not raised in the District Court or in the arbitral hearing: (1) the appealed Order had violated various constitutional rights of Skurnick; (2) primary jurisdiction of the parties' dispute of an arbitral award was in the Florida Department of Banking and Finance and not in theDistrict Court; and (3) Florida law did not apply to the dispute but New York law did because of a choice of law provision to this effect in the Customer's Agreement executed between Ainsworth and Skurnick when the account was opened so that Skurnick could not

have been found to have violated Floridas SIPA by the arbitrators.[3]

As the appellate court noted in *Ainsworth v. Skurnick*, 909 F. 2d 456 (11th Cir. 1990) (*Ainsworth I*) the sole question on appeal involves an interpretation of Fla. Stat. § 517.12, specifically the determination of when a sale of securities is considered to have been made in Florida so as to trigger the application of the automatic damage provisions of Fla. Stat. § 517.211. For as the appellate court stated "the district court had no difficulty with the issues in this case, nor do we, until confronting the issue of whether the subject sales were made in Florida." At 990 F.2d 458.

Consequently, the appellate court certified the following question to the Florida Supreme Court.

> Whether, under the undisputed facts of this case, the transactions between the parties constituted a sale of securities in Florida within the meaning of Fla. Stat. Sec. 517.12.
>
> Our statement of the question is not designed to limit the Supreme Court of Florida in its consideration of the problems posed by this entire case. In order to assist consideration of the case, the entire record, along with the briefs of the parties, shall be transmitted to the Supreme Court of Florida.

QUESTION CERTIFIED

On September 12, 1991, the Florida Supreme Court answered the certified question in the affirmative in *Skurnick v. Ainsworth*,

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3. Skurnick aga[illegible]s issues, in his Petition, that were not raised below. This will be more fully addressed in the following section of this brief.

591 So. 2d 904 (Fla. 1991). This decision was not appealed by Skurnick.

Upon certification, the Eleventh Circuit Court of Appeals requested letter briefs which addressed the effect of:

(a) The Florida Supreme Court's certification order dated September 12, 1991;

(b) The court's decision in *O.R. Securities v. Professional Planning Assoc.*, 857 F.2d 742, 746 (11th Cir. 1988); and,

(c) 9 U.S.C. § 10.

Thereafter, with the original briefs of the parties, the certified question answered by the Florida Supreme Court and the letter briefs of the parties, wherein Ainsworth pointed out to the appellate court that the District Court was right for the wrong reason, the Eleventh Circuit issued its opinion in *Ainsworth v. Skurnick*, 960 F.2d 939 (11th Cir. 1992) (*Ainsworth II*).

In *Ainsworth II*, the court discussed the use of manifest disregard of the law standard to vacate an arbitration award and then went on to state:

> This Circuit, however, has never adopted that standard as a ground for vacating an arbitration award. . . .The cases are unclear as to whether we have ever held that it would be error to vacate an arbitration award as being in manifest disregard of the law.
>
> Our cases do hold, however, that although great difference is normally accorded an

> arbitration award, an award that is arbitrary or capricious is not required to be enforced . . . An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case.

The appellate court then went on to state why the award of the arbitrators based upon the specific facts of this case was arbitrary and capricious and affirmed the decision of the District Court.

Skurnick then filed the subject Petition with this Court and again has attempted to raise issues not before the trial court such as his due process argument arising under the Fifth Amendment to the United States Constitution and whether or not the decision of the Eleventh Circuit panel conflicts with the best interests of the government.

REASONS FOR DENYING THE WRIT

Skurnick has set forth a litany of reasons as to why his Petition should be granted and then embarks primarily into a factual re-argument of his case. In essence, Skurnick is asking the Court to review the evidence or inferences drawn from it and determine factually that the District Court erred. This is not a reason for the granting of his Petition. *General Talking Pictures Corporation v. Western Electric Company*, 58 S. Ct. 849 (1938).

Both the decision of the District Court and those of the Eleventh Circuit Court of Appeals reflect the undisputed facts upon which both courts based their decisions of which Skurnick complains. Skurnick refuses to accept the effect of his activities, in Florida, as they relate to Ainsworth. At this point, it is important to note that the facts underlying the Eleventh Circuit's decision in *Ainsworth II* would have been reviewed *de novo*. *Robbins v. Day*, 954 F.2d 679, 681 (11th Cir. 1992).

Further, Skurnick does not have a clear understanding concerning certain of the legal issues involved in holding him liable for a violation of Florida Statute § 517.12. This is reflected in the portion of his Petition labeled "Constitutional and Statutory Provisions Involved" wherein he references the United States Securities Exchange Act of 1934, Section 78c(4) and (5) which defines the term "broker" and "dealer" under that statute and also references the Fifth Amendment to the Constitution of the United States.

In that regard Skurnick's reliance on §§ 78c(4) and (5) is misplaced in that this case deals with a violation of Florida Statute § 517.12 and as the District Court indicated in its Order Vacating Arbitration Award and entering judgment for Petitioner:

> . . . Florida Statutes Section 517.021(7) provides "broker means 'dealer' as herein defined." Section 517.021(9) defines dealer as:
>
> 1. Any person, other than an associated person registered under this chapter, who engages either for all or part of his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

The District Court then went on to indicate that this definition of dealer precisely describes the role that Skurnick played for Ainsworth. Therefore, it is apparent that 15 U.S.C. §§ 78c(4) and (5) are not involved in this action.

Skurnick also attempts to assert a Fifth Amendment argument to this Court as he did with the Eleventh Circuit. As Ainsworth pointed out to the Eleventh Circuit, this issue was raised for the

first time on appeal and was not presented to the lower court.

I.

CONFLICT WITH DECISIONS OF THIS COURT

Skurnick contends that the Eleventh Circuit decision in this case conflicts with this Court's decisions in *Bernhardt v. Polygraphic Co. of America*, 76 S. Ct. 273 (1956) and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 80 S. Ct. 1358 (1960). Ainsworth sees no conflict. The District Court in its original order of remand did not determine that there was "a mere ambiguity in the opinion accompanying an award" but that the award itself was capable of two very different interpretations. It was the award itself that the District Court determined needed to be clarified This the arbitrators did. For as the District Court noted, "it is not the function of the Court to review the merits or *construe* the meaning of the award." (Emphasis added.) Citing *American Federation of State, County and Municipal Employees, Local Lodge No, 1803 v. Walker County Medical Center*, 715 F.2d 1517, 1519 (11th Cir. 1983). It was based upon this second or amended award of April 4, 1988 that the District Court entered its order of June 19, 1989.

II.

CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL

In attempting to show a conflict with decisions of other courts of appeal, Skurnick is reaching for straws that do not exist.

The first case that Skurnick relies upon to demonstrate a conflict between different Circuit Courts of Appeals is *Marshall v. Green Giant & Co.*, 942 F.2d 539, 544 (8th Cir. 1991). Again

Ainsworth sees no conflict between the holding in that case and the matter presently before this Court.

In *Marshall*, the court was called upon to determine whether or not the registration provisions of the Commodity Exchange Act provided a private cause of action for the farmers who sued Green Giant in that case. The court held that it did not.

It is apparent that this case is distinguishable from the case at bar. For as the Florida Supreme Court noted in *Skurnick v. Ainsworth*, 591 So. 2d 904, 906 (Fla. 1991):

> The intent of § 517.12 is to protect purchasers and, if that section has been violated, damages are automatic in accordance with the provisions of § 517.211.

As to the quotations reflected in Skurnick's petition, allegedly arising from the *Marshall* decision as referenced on page number 24 thereof, Ainsworth was unable to locate the first quotation anywhere in that decision. The closest that Ainsworth could come to that quotation, referenced by Skurnick, is on page 544 thereof where it is stated, under the procedural history of that case, that:

> The district court agreed with Green Giant and, in January 1988 confirmed the award and referred the collateral estoppel question to arbitration.

The second quotation set forth by Skurnick shows up on a page 546, of the *Marshall* decision, and is taken out of context and specifically does not hold, as Skurnick indicated on page 25 of his Petition, that "failure to register with proper authorities does not in itself, entitle the Plaintiff to collect damages" he did not actually suffer.

Skurnick then contends that the court's decision in *Ainsworth II* conflicts with two Second Circuit cases, *i.e., Amicizia Societa Navegozione v. Chilean & Ionine Sales Corp.*, 274 F.2d 805 (2nd Cir. 1960) and *Diapulse Corp. of America v. Carba Limited Ltd.*, 626 F.2d 1108 (2nd Cir. 1980).

Again, Skurnick misses the mark concerning his analyzation of those cases. For example, the quotation, from the *Amicizia* decision referenced on page 25 of his petition, is correct. However, the next sentence following that quotation states as follows:

> It is true that an award may be vacated where the arbitrators have exceeded their powers. 9 U.S.C. § 10d. Apparently relying upon this phrase, the Supreme Court in *Wilco v. Swan*, 74 S. Ct. 182 (1953) suggested that an award may be vacated if in manifest disregard of the law.

This issue itself was never reached in the *Amicizia* case because of the fact that the only issue before the court was whether the arbitrators misconstrued a contract and the court determined that whether the contract was correctly construed or not was not opened to judicial review.

As a matter of fact, in *Carte Blanche (Singapore) v. Carte Blanche (Int.)*, 888 F.2d 260 (2nd Cir. 1989), the Second Circuit specifically acknowledged that in addition to the grounds set forth in 9 U.S.C. §§ 10 and 11, a judicially created manifest disregard law standard has been determined to exist as a grounds for review of arbitration awards.

As argued to the Eleventh Circuit Court of Appeals by Ainsworth, this case was factually unique because the arbitrators were given specific instructions by the District Court as to the applicable law and the requirement to award damages but they

chose not to do so. As the *Ainsworth II* court put it:

> There was no reasonable basis upon which the panel may have acted . . . *In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis.*

(Emphasis added.)

In *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117 (2nd Cir. 1991), the Second Circuit also acknowledged that by implication that if a ground for the arbitrators' decision cannot be inferred from the facts of the case, the award should be vacated.

Between the issuance of its opinion in *Ainsworth I* and *Ainsworth II*, the Eleventh Circuit issued its opinion in *Robbins v. Day*, 954 F.2d 679 (11th Cir. 1992), wherein the court stated:

> . . . The Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards and that the court's review of arbitration process will be severely limited.
>
> * * *
>
> . . ., when a district court goes against the presumption that it should affirm an arbitration award, we must review de novo to protect the integrity of the arbitration process.
>
> * * *
>
> The statute does not allow an arbitration

> award to be vacated solely on the basis of error of law or interpretation but requires something more, such as misconduct pertaining to the proceedings on the part of the arbitration or the parties.
>
> * * *
>
> Following Eleventh Circuit precedent, we decline to adopt the manifest disregard of the law standards.

What the court did in *Robbins* was re-enforced in *Ainsworth II* when it stated:

> Courts are generally prohibited from vacating an arbitration award on the basis of errors of law or interpretation, and the express terms of 9 U.S.C. §§ 10 and 11 have often been deemed the exclusive grounds for vacation or modification. Several courts have discussed the use of a "manifest disregard of the law" standard to vacate an arbitration award. This Circuit, however, has never adopted that standard as a ground for vacating an arbitration award. The cases are unclear as to whether we have ever held that it would be error to vacate an arbitration award as being in manifest disregard of the law.
>
> Our cases do hold, however, that although great deference is normally accorded an arbitration award, an award that is arbitrary or capricious is not required to be enforced. An award is arbitrary and capricious only if "a

ground for the arbitrator's decision cannot be inferred from the facts of the case."

Such is the case here. There is simply no explanation in the award itself why damages were not awarded. The award said that "the Claimant sustained no damages; [a]nd, therefore, we conclude that the Claimant is not entitled to recover" damages. This is a non-sequitur for which there is no basis. The arbitrators did not reflect any disagreement with the district court's statement of the law. Even if there was a dispute as to the application of section 517.12 to the undisputed facts of this case, there is none now, since the Florida Supreme Court certification. We have to assume that the arbitrators' decision was arbitrary or capricious for two reasons; first, it was a reasonable interpretation of the statute made by the district court in questioning the vagueness of the panel's first decision; and their second award does not indicate that they differ with the point nor does it give any reason for not awarding mandatory damages. Since they knew the law required damages, their refusal to grant damages is clearly arbitrary. There was no reasonable basis upon which the panel may have acted. In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis (citations omitted).

Based upon the above, it is apparent that the requirements to

vacate an arbitration award in the Eleventh Circuit are more stringent then in those Circuits that have adopted the manifest disregard of the law standard. However, in those unique factual situations such as those that exist in this case, judicial review is necessary to prevent arbitrators from not only disregarding the law but also the uncontrived facts of the case. Simply put, arbitrators cannot be allowed to act in an arbitrary and capricious manner.

III.

ISSUES RAISED BUT NOT ARGUED

Skurnick feels that even after three separate courts have heard and considered the issues in this case, he has somehow been deprived of property without due process of law. This is a non-sequitur. Not only has he not presented any facts in support of this contention, he has presented no legal argument in support thereof.

CONCLUSION

Based upon all of the foregoing authorities and argument, the Skurnick Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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